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IN THE

Supreme Court of the United States

October Term, 1969

PETITION NOT PRINTED
REPLY BRIEF NOT PRINTED

No. 1380

JAMES HORELICK and SANDRA ADICKES,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Preliminary Statement

The petitioners James Horelick and Sandra Adickes seek a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit entered February 27, 1970 which unanimously affirmed an order of the United States District Court for the Southern District of New York which granted a motion to remand to the New York State courts the criminal prosecutions against petitioners.

Questions Presented

1. Whether the pending state criminal trial of the petitioners on charges of trespass, resisting arrest or menacing can be removed to the federal courts under the civil rights removal statutes on the grounds that the arrests occurred when petitioners were entering a school building that had been closed as result of a teachers' strike, petitioners' alleged motive being to end *de facto* segregation in the New York City public school system.

2. Whether Title 18 U.S.C. Section 245(b) can provide a basis for removal of a state criminal prosecution to a federal court where the only intimidation of petitioners by state officers that is alleged is conduct constituting the orderly working of the state criminal process.

Statement of the Case

The Arrests and Initiation of State Criminal Proceedings

The petitioners were arrested and are charged with criminal trespass and resisting arrest. On or about October 4, 1968 a labor dispute developed between the New York City Board of Education and the United Federation of Teachers resulting in the closing of public schools in the city. On October 16, the Board of Education directed that the schools be opened and available to students where a competent and qualified teacher appears at a school. To implement that policy, district superintendents were authorized to issue letters of designation, appointing certain teachers as "Teacher-in-charge." This directive also established procedures to be followed should the designated teacher be unable to secure access to the school building.

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On October 17, 1968, the principal of Washington Irving High School directed that the school be closed; Mr. Edward Williams was designated "Teacher-in-charge" at that school.

On that date, a group of nonstriking teachers, including both petitioners, appeared at Washington Irving High School in New York City, demanding admission to the locked school. Both appellants were assigned as teachers in the school.

At about 12:45 p.m., the school custodian, Andre Clermont, observed the petitioner Horelick inside the locked building. Upon the request of the custodian, Patrolman John Van Houten of the New York City Police Department placed Horelick under arrest for trespassing. Horelick attempted to evade custody, wrestled and attempted to kick the police officer. As petitioner Horelick was being placed in a police car, petitioner Adickes, who was still outside the school building, attempted to pull Horelick from the car.

Both petitioners were arrested and were given summonses to appear in court. On October 22, 1968, complaints were filed in the New York City Criminal Court (A. 13, 14).* Petitioner Horelick was charged with the misdemeanors of criminal trespass in the second degree [N.Y. Penal Law §140.10] and resisting arrest [N.Y. Penal Law §205.30]. Petitioner Adickes was charged only with the misdemeanor of resisting arrest [N.Y. Penal Law §205.30]. A charge of harassment [N.Y. Penal Law §240.25] was added thereafter (see A. 6).

* References preceded by "A" are to the pages of the "Separate Record and Appendix of Papers Filed Below" which petitioners filed in this Court.

In a separate incident, on October 20, 1968 at about 12:01 a.m., Horelick refused to leave Washington Irving High School at the request of the custodian, Andre Clermont and Patrolman John Hodne of the New York City Police Department. He was arrested and again summonsed. In a complaint filed in the New York City Criminal Court on November 2, 1968, he was again charged with criminal trespass in the second degree. N.Y. Penal Law §140.10.

The three matters were adjourned several times and consolidated for trial. The cases were set for trial on September 30, 1969, petitioners having waived their statutory right to a three-judge bench. See N.Y.C. Crim. Ct. Act §40.

Attempt to Enjoin the State Trial

On September 25, 1968, petitioners served upon the District Attorney of New York County a summons and complaint returnable in the District Court for the Southern District of New York, requesting an injunction to prevent the prosecution of the pending criminal charges against petitioners; seeking a declaratory judgment to declare New York Penal Laws §§35.27 and 140.10 unconstitutional and declaring that the denial of petitioners' request for a jury trial on these charges was unconstitutional; and demanding damages in the amount of $500,000. Horelick and Adickes further moved in the District Court for a temporary restraining order preventing the prosecution of petitioners on September 30, 1969. The application for the temporary restraining order was denied (Bryan, J.). A hearing on the remaining matters was set for October 7, 1969.

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A hearing was held on that date. On December 9, 1969, Judge SYLVESTER J. RYAN dismissed petitioners' complaint and denied their request for injunctive relief staying the pending trial. An appeal has been taken to the United States Court of Appeals for the Second Circuit. The appeal is currently set to be heard in September or October 1970.

The Instant Removal Proceedings

On the morning of September 30, 1969, on the day set for trial, during the pendency of the proceedings for an injunction, petitioners served upon the District Attorney of New York County and the New York City Criminal Court a petition for removal, pursuant to Title 28 U.S.C. §§1443 (1), (2).

In the petition, they alleged that the strike by the union was illegal, that it was called to oppose "a community plan enacted in law, the purpose of which was to change and remedy the deleterious effect of segregated education upon black children in the New York City school system," that petitioners "did not support the aims of the strike and sought to carry on their regular duties to the benefit of said [black and Puerto Rican] children and parents and the City of New York" (A. 3-4). The petition alleged that Horelick entered the school and was beaten by the police; there was also the claim that Adickes saw Horelick in "battered and disheveled condition" and was pushed into a police car and arrested (A. 5). The petition specifically

relied on 28 U.S.C. §1443 (1) and 28 U.S.C. §1443 (2), using merely the statutory language (A. 7-8). Petitioners contended that the prosecution was

> "with the sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation which have existed de facto in the public school system of New York City which the state apparently seeks to enforce by statute, ordinance, regulations, custom, usage and practice" (A. 7).

Respondent moved, pursuant to 28 U.S.C. §1447 (c), to remand the case to the New York City Criminal Court (see A. 15-20). In opposition petitioners submitted affidavits showing that the strike was racially motivated (A. 29, 32), and an affidavit by petitioner Adickes (A. 21) in which, relying on the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, she alleged that her conduct in entering the school was in furtherance of her desire to end *de facto* segregation (A. 28).

On October 7, 1969, Judge Sylvester J. Ryan granted respondent's motion to remand, the remand to become effective on October 14, 1969 (A. 37). Thereafter, petitioners moved in the Court of Appeals for the Second Circuit for a stay of the state trial pending the instant appeal of the remand order. On October 10, 1969, the court denied petitioners' motion. Petitioners then applied to this Court for a stay of the trial on the criminal charges. Mr. Justice Harlan denied their application on October 13, 1969; on October 20, the full Court unanimously denied the stay. *Horelick* v. *New York,* 396 U.S. 873.

On February 27, 1970 the Court of Appeals for the Second Circuit affirmed Judge RYAN's order. *New York* v. *Horelick*, —— F.2d —— (Docket No. 34140, slip op. p. 1724). The Court, in an opinion by Circuit Judge FRIENDLY, which is reproduced as Appendix B to the instant petition for certiorari, held that "the ordered functioning of state legal process, whatever the motivation," was not the intimidation "by force of or threat of force" referred to by 18 U.S.C. §245(b). Accordingly, the removal petition was held to have been unfounded. After the affirmance petitioners sought a stay of the mandate. The stay was denied by Mr. Justice HARLAN on March 12, 1970, and by Mr. Justice STEWART on March 17, 1970.

The trial of the pending charges against petitioners has been adjourned numerous times and is currently scheduled for June 10, 1970 in the New York City Criminal Court.

ARGUMENT

POINT I

Since petitioners failed adequately to allege that they were enforcing a law "providing for the equal civil rights of citizens of the United States," the case was properly remanded to the state courts, and review in this Court is unnecessary.

Petitioners argue that they sought to eliminate *de facto* segregation allegedly existing in the New York City public school system by attempting to enter the closed school building. The petition for removal alleged that such discrimination exists and that the school strike called by the United Federation for Teachers was an attempt by the

union to perpetrate that policy of discrimination. They contend that their right to resist the strike was founded on the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* and the Civil Rights Law of 1968, 18 U.S.C. §245. The Civil Rights Act of 1964 provides for desegregation of public schools in the several states. The Civil Rights Law of 1968, 18 U.S.C. §245, enumerates "federally protected activities," and provides for criminal penalties for violations of the law. Specifically, §245 imposes criminal penalties against those who interfere with persons participating or persons aiding those participating in the benefits of federally funded programs without regard to race, color, religion or national origin. Petitioners contend that these civil rights statutes are "laws providing for equal civil rights of citizens of the United States". They assert that their arrests on charges of criminal trespass, resisting arrest and harassment result in a denial of these rights in such a way that they may remove the criminal cases to the federal district court pursuant to 28 U.S.C. §1443 (1).

Petitioners' allegations that they had a right to enter a closed school and resist arrest are manifestly insufficient and do not entitle them to remove the pending criminal cases to the federal district court. Title 28, U.S.C. Section 1443(1) provides that:

> "Any of the following civil actions or criminal prosecutions, commenced in a State Court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any

> law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof * * *."

This statute contemplates removal to the federal court of state prosecutions against persons who cannot enforce in the state courts a right under "any law providing for specific civil rights stated in terms of racial equality." *Georgia* v. *Rachel*, 384 U. S. 780, 792 (1966); see, *Chestnut* v. *New York*, 370 F. 2d 1 (2d Cir. 1966). Section 1443 applies only where the right upon which the defendant relies is a "right under any law providing for equal civil rights," and the defendant is "denied or cannot enforce" that right in the state courts.

In the instant case there is a civil rights statute prohibiting discrimination in public schools. Civil Rights Act of 1964. Further, there is a statute which prohibits intimidating, coercing or threatening any person attempting to assist another to secure those rights. Civil Rights Law of 1968, 18 U.S.C. §245. But there is no statute "specifically and uniquely [conferring] upon defendants an absolute right to 'violate' the explicit terms of the state criminal trespass law with impunity * * *." *City of Greenwood* v. *Peacock*, 384 U. S. 808, 826-827 (1966), distinguishing *Georgia* v. *Rachel, supra;* see *New York* v. *Davis*, 411 F.2d 750, 754 (2d Cir. 1969).

There is no right, created by laws "providing for equal civil rights of citizens of the United States," which entitles persons to enter public school buildings that have been secured at the direction of its principal. Nor is there a federal right which permits such persons to strike police

officers or attempt to take persons arrested from a police officer's custody. See *New York* v. *Davis, supra.* It is to be remembered "* * * that the provisions of Section 1443 (1) do not operate to work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law." *Id.* at 831. It is not enough for the defendant to claim the right of removal afforded by Title 28 U.S.C. Section 1443 (1)—they must come within the purview of those for whom this right is intended. This they have failed to do.

The statute upon which petitioners rely, Title 18 U.S.C. §245(b), imposes criminal liability on anyone who, "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" persons engaged in certain activities. Thus, as the Court below per FRIENDLY, C.J., held:

> "§245(b) is aimed only at intimidation 'by force or threat of force,' and that denotes violent activity, not the ordered functioning of state legal processes, whatever the motivation."

Petitioners do not refute that holding and the decision below was clearly correct. And, the other provisions of Title 18 U.S.C. §245 indicate a clear congressional intent to preclude the statute's use as a predicate for removal. Section 245(a)(1) specifically states:

> "(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section,

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> nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law." See also Title 18 U.S.C. §245(c).

In sum, the statutes relied upon do not provide the requisite basis for removal.

Petitioners argued that certiorari should be granted because there is a conflict between the circuits. Specifically, they claim that the holding here is in conflict with decisions in the Fifth Circuit such as *Walker* v. *Georgia*, 417 F.2d 1 (5th Cir. 1969), *Whatley* v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968), and *Wyche* v. *Louisiana*, 394 F.2d 927 (5th Cir. 1967). The conflict does not exist, for the Court below did not consider the merits of petitioners' claims on the grounds relied upon in the cited cases. As the Court of Appeals for the Second Circuit stated, when noting that §245(b) did not cover petitioner's activities:

> "While the federal statutes [petitioners invoke] • • • arguably provide for 'equal civil rights,' though stated only in terms of federal criminal penalties for their violation, we need not decide this. Neither must we choose between the position reluctantly reached by Judge Sobeloff in *North Carolina* v. *Hawkins, supra* [365 F.2d 559 (4th Cir. 1966, *cert. denied*, 385 U.S. 949 (1966)], and that of the Fifth Circuit in *Whatley* v. *City of Vidalia, supra*, and *Davis* v. *Alabama, supra* [399 F.2d 527 (5th Cir. 1968)], on the question whether a prohibition against 'intimidation,' as contrasted with one against an 'attempt to punish,' can bring a case within *Rachel.*"

Moreover, petitioners made no showing that their federal rights will not be adequately and effectively preserved in the state courts. Unlike the facts in *Georgia* v. *Rachel*, where it could clearly be predicted that the very act of trying those defendants on criminal trespass charges denied them a "federal right substituted for a state crime," no such prediction can be made in the instant case. This Court has designated the touchstone to be applied in deciding removal cases under this statute:

> "It is not enough to support removal under Section 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. * * * The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under Section 1443(1) the vindication of the defendant's federal rights is left to the state courts except in rare situations where it can be clearly predicted by reason of the operation of a persuasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel, ante; Strauder* v. *West Virginia*, 100 U.S. 303." *City of Greenwood* v. *Peacock, supra* at 827-8.

Petitioners seek, in effect, to argue, as a basis for removal, claimed defenses in the criminal trial, and ask for a federal hearing to establish them. These matters are irrelevant. The purpose of the strike, petitioners' motives in seeking to enter the closed school building, the delegated authority claimed by them to so act, the "lawfulness" of

the custodian's acts denying them privilege and authority to enter or remain upon the school premises and the amount of force used to resist arrests are, at best, matters of defense cognizable at trial; even their relevance as a defense to the criminal charges is dubious.

Finally, it must additionally be noted that petitioner Adickes was arrested and charged with resisting arrest (N.Y. Penal Law §205.30) and harassment (N.Y. Penal Law §240.25) in attempting to pull Horelick from a police car after his arrest. Her claim that her arrest was improper and that such conduct is protected by a federal law providing for equal civil rights is clearly unfounded. "No federal law * * * confers an absolute right on * * * anybody * * * to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman." *City of Greenwood* v. *Peacock, supra,* at 826-27; see *New York* v. *Davis, supra.* Her conduct is clearly independent of that of petitioner Horelick and unrelated to the charge of criminal trespass against him. In short, she does not assert even a conceivable claim for removal.

POINT II

Since petitioners have not shown that they were acting under color of a statute directing them to engage in specific acts, removal was improper under 28 U.S.C. §1443(2).

Petitioners argue that as teachers they were state officers acting under color of authority from the New York City Board of Education in seeking to open and keep open Washington Irving High School. They rely on Title 28 U.S.C. §1443(2), which provides for removal of a prosecu-

tion "For any act under color of authority derived from any law providing for equal rights or for refusing to do any act providing for equal rights or for refusing to do any act on the ground that it would be inconsistent with such law." They contend that "the action of the Union in calling the illegal strike became effective as state action of a discriminatory nature against them when enforced by the police." Petition for certiorari, p. 22. That is, they allege that refusing to leave the school was inconsistent with the Civil Rights Act. However, it is clear that the statutory removal scheme applies where a federal law provides for self-help and the removal-petitioner is being prosecuted for refusing to act contrary to that law. *Cf. New York* v. *Galamison,* 342 F.2d 255, 265 n. 10 (2d Cir. 1965), *cert. denied* 380 U.S. 977 (1967). The "refusal" clause was added to the statute "to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce these laws." Cong. Globe, 39th Cong., 1st Sess., 1366 (1866); *New York* v. *Galamison, supra* at 266 n. 11; *City of Greenwood* v. *Peacock, supra* at 824 n. 22. Of course there is no state law discriminating on account of race in the New York educational system and, as the Court below noted:

> "But petitioners have not pointed to any federal equal rights law with which a teacher's submission to arrest or departure from school premises on request would be inconsistent.
>
> • • •
>
> "Petitioners are not being prosecuted for refusing to enforce any law of the State or ordinance of the City of New York discriminating against school children on account of race or color, as in the case, admittedly

unlikely today, where a teacher was being prosecuted for having admitted black children to a school in which racial segregation was required by state law. In contrast petitioners are being prosecuted for acting on the basis that the school was open by order of the Board of Education whereas the custodian and the police said it was closed, and refusing to submit to arrest." See *O'Keefe* v. *Board of Elections,* 246 F.Supp. 978 (S.D. N.Y. 1965).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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